SUPREME COURT, U. S.

No. 1218

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IN THE

Supreme Court of the United States

October Term, 1967

PHILIP C. ANDERSON, et al., *Appellants*

v.

NORBERT TIEMANN, et al.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

JURISDICTIONAL STATEMENT

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INDEX

Subject Index

	Page
Opinion Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Questions Presented	4
Statement	6
The Questions are Substantial	6
The Questions are Important	22
Conclusion	23
Appendix A	24

Cases Cited

Alaska Steamship Co. v. Mullaney, 180 F. 2d 805 (C. A. 9, 1950)	19
Anderson v. Tiemann, 182 Neb. 393, 155 N. W. 2d 322	1, 24
Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 9 L. Ed. 2d 584, 83 S. Ct. 631 (1963)	2
Borden v. Selden, 146 N. W. 2d 306 (Iowa 1966)	11, 12
Brock v. Superior Court, 71 P. 2d 209 (Cal. 1937)	16
Burge v. Marcum, 394 S. W. 2d 908 (Ky. 1965)	12
Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855	18
City of Cleveland v. Piskura, 60 N. E. 2d 919 (Ohio 1945)	16
Commonwealth v. Warner Bros. Theatres, Inc. (Pa. 1942), 27 A. 2d 62	16
Crowly v. Thornbrough, 294 S. W. 2d 62 (Ark. 1956)	15
Darweger v. Staats, 267 N. Y. 290	21
Darweger v. Staats, 275 N. Y. S. 394	17
Dawson v. Hamilton, 314 S. W. 2d 532 (Kent. 1958)	16
Dearborn Independent v. City of Dearborn, 49 N. W. 2d 370 (Mich. 1951)	16

Page

Featherstone v. Norman (Ga. 1930), 153 S. E. 58 -- 16
Florida Industrial Commission v. State, 21 S. 2d 599 (Fla. 1945) ---------- 16
Head v. McKenney, 6 S. E. 2d 405 (Ga. 1939) ------ 16
Holgate Bros. Co. v. Bashore, 200 Atl. 672 (Pa. 1938) 16
Hutchins v. Mayo, 197 So. 495 (Fla. 1940) ---------- 16
Idaho Saving & Loan Association v. Roden, 350 P. 2d 225 (Ia. 1960) ---------- 16
Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834 ---------- 18
Opinion of the Judges, 140 N. W. 2d 34 (S. D. 1966) 13, 21
Opinion of the Justices, 239 Mass. 606 ----------17, 20
Santee Mills v. Query, 115 S. E. 202 (S. C. 1922) -- 16
Seale v. McKennon, 336 P. 2d 340 (Ore. 1959) ---- 16
Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492 (1935) ----------15, 17
State v. Ashby, 387 P. 2d 588 (N. M. 1963) -------- 10
State v. Bertsen, 200 P. 2d 1007 (Ida. 1948) -------- 10
State v. Intoxicating Liquors, 117 A. 588 (Me. 1922) 16
State v. Urquhart, 310 P. 2d 261 (Wash. 1957) ---- 16
State v. Webber, 133 A. 738 (Me. 1926) ---------- 16
Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 40 S. Ct. 228, 64 L. Ed. 460 (1920) --5, 7, 9, 10, 12, 13, 22

Constitution Cited

Art. IV, Sec. 2, Constitution of U. S. ---------- 7
Art. IV, Sec. 4, Constitution of U. S. ---------- 20
Tenth Amendment, Constitution of U. S. ----------5, 18
Fourteenth Amendment, Constitution of U. S. ------5, 7
Art. VIII, Sec. 1B, Constitution of Nebraska ------ 4

Statutes Cited

28 U. S. C., Section 1257(2) ---------- 2

Page

Legislative Bill 377, 1967 Session of Nebraska Legislature ---------- 2, 3, 4, 6, 7
Vol. 2, Revised Statutes of Neb., Reissue 1964, p. 5, sec. 4., Enabling Act of Congress ---------- 4, 20

Texts Cited

16 Am. Jur. 2d, Constitutional Law, Sec. 516, p. 902 9
42 Am. Jur., Public Administrative Law, Sec. 45, p. 342 ---------- 19
12 A. L. R. 1435 ---------- 19
54 A. L. R. 1104 ---------- 19
92 A. L. R. 400 ---------- 19
16A C. J. S., Constitutional Law, Sec. 478b, p. 222 -- 9

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OPINION BELOW

The opinion of the Supreme Court of the State of Nebraska appears in 182 Neb. 393, 155 N. W. 2d 322, a copy of which appears here as Appendix A.

JURISDICTION

The decision of the Supreme Court of the State of Nebraska was entered on December 22, 1967, affirming a decree of the District Court of Lancaster County, Nebraska. A motion for rehearing was filed by the appellants on January 10, 1968, which motion was overruled by the Supreme Court of the State of Nebraska on February 13, 1968. Notice of appeal was filed by the appellants in the

Supreme Court of the State of Nebraska on February 15, 1968. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(2). *Bantam Books, Inc. v. Sullivan,* 372 U. S. 58, 9 L. Ed. 2d 584, 83 S. Ct. 631 (1963).

STATUTORY PROVISIONS INVOLVED

The 1967 session of the Nebraska Legislature enacted Legislative Bill 377, which became law April 12, 1967. Laws of Nebraska 1967, Page 1533. The Bill contains three parts, a "Sales and Use Tax," covering Sections 1-13; an "Income Tax", covering Sections 14-124; and "General Provisions", covering Sections 125-137.

This action challenges the constitutionality of the Income Tax provisions. The provisions of the bill dealing with a sales and use tax, and the "General Provisions" are not challenged.

There are three constitutional objections to the income tax provisions. First, a challenge is made against the "food sales tax credit", a credit against tax which is allowed to all residents but denied to all nonresidents, thus discriminating against the latter. Second, the Nebraska income tax is a percentage of the federal income tax under the federal income tax laws as existing and as changed from time to time in the future Appellants contend that this is an unlawful delegation of state legislative power to the federal Congress, contrary to the federal Constitution. Third, a closely related contention, appellants contend that the delegation of state legislative powers to the federal Congress just described violates the compact between the State of Nebraska and the federal government at the time Nebraska was admitted into the Union as to the requirement that Nebraska have a "republican" form of government.

As for the first contention, regarding the "food sales tax credit", appellants challenge Section 15(2) and (3)(a), which provide as follows:

> (2) (a) A resident of this state shall mean an individual who is domiciled in Nebraska or who maintains a permanent place of abode in this state and spends in the aggregate more than six months of the taxable year in this state; and
>
> (b) A nonresident shall mean an individual who is not a resident of this state.
>
> (3) (a) *There shall also be allowed to resident individuals as a credit against the tax imposed by this act, a food sales tax credit equal to seven dollars multiplied by the number of allowable personal exemptions claimed for individuals who are residents,* exclusive of the extra exemptions allowable for age or blindness. A refund shall be allowed to the extent that the food sales tax credit exceeds the income tax payable by the resident individual for the taxable year but no *refund shall be made* in any amount less than two dollars.

As to the second and third contentions, that there is an unlawful delegation of legislative authority to the federal Congress and that such unlawful delegation constitutes a breach of the compact between the State of Nebraska and the federal government that Nebraska have a "republican" form of government, there is involved the following provision from Section 14 of Legislative Bill 377:

> "Sec. 14. Any term used in sections 14 to 124 of this act shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required. Any reference to the laws of the United States shall mean the provisions of the Internal Revenue Code of 1954, and amendments thereto, other provisions of the laws of the United

States relating to federal income taxes, and the rules and regulations issued under such laws, *as the same may be or become effective, at any time or from time to time, for the taxable year.* * * *"

Also involved is the following from Section 15(1) of the Bill:

"Sec. 15. (1) A tax is hereby imposed for each taxable year on the entire income of every resident individual of this state and on the income of every nonresident individual of this state which is derived from sources within this state. *The tax shall be a flat percentage of,* for each resident individual, *the taxpayer's adjusted federal income tax liability for the taxable year* * * *."

Also involved is Article VIII, Section 1B, of the Constitution of the State of Nebraska:

"Sec. 1B. Income tax; may be based upon the laws of the United States. When an income tax is adopted by the Legislature, the Legislature may adopt an income tax based upon the laws of the United States. (Adopted 1966)"

As to the third contention that there is a violation of Nebraska's compact with the federal government on the admission to the union requiring it to have a "republican" form of government there is involved an Enabling Act of Congress which appears in Volume 2 of the Revised Statutes of Nebraska, Reissue of 1964, Page 5, Section 4, which among other conditions requires that the Nebraska Constitution "when formed *shall be republican,* and not repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

QUESTIONS PRESENTED

1. Nebraska's new income tax law provides for an income tax on residents and also on nonresidents for income

derived from sources within the state and provides for a very substantial credit against this tax for all residents, but excludes all nonresidents from receiving any such credit whatever. The question is whether this is discrimination which violates the due process, privileges and immunities, and equal protection clauses of the Constitution of the United States, and the decision of this Court in *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, 40 S. Ct. 228, 64 L. Ed. 460 (1920), and a long line of federal and state decisions since that time.

2. Nebraska's new income tax law adopts by reference the federal income tax laws and provides that Nebraska's state income tax shall be a percentage of the federal income tax owing under federal income tax laws "as the same may be or become effective, at any time or from time to time, for the taxable year." The Nebraska constitutional provision, as interpreted by the Nebraska Supreme Court, allowed Nebraska to base its state income tax on the federal income tax laws as now existing and as they may be changed from time to time in the future. The question is whether the provisions of the state income tax in adopting future federal laws are a violation of the Constitution of the United States in delegating state legislative power to the federal government in violation of the federal Constitution as to its Tenth Amendment, and the Fourteenth Amendment, as to its due process, privileges and immunities, and equal protection clauses.

3. Under the enabling legislation by which Nebraska became a state, it was required that Nebraska have a "republican" form of government. The question is whether the state income tax law which adopts future federal legislation is contrary to the requirement of a "republican" form of government so as to be in violation of the compact.

STATEMENT

Legislative Bill 377, Nebraska's new sales-income tax law became law April 12, 1967. This action was brought by five individuals and two Nebraska corporations challenging the validity of the income tax provisions of said bill under the Constitutions of the United States and Nebraska. Three of the plaintiffs are nonresidents of the State of Nebraska though subject to its income tax provisions. The defendants are Nebraska officials and the State Board of Equalization and Assessment, all given duties of enforcement under said bill. The action asks a decree invalidating all of the income tax provisions of the bill and enjoining its enforcement.

The District Court of Lancaster County, Nebraska, where the action was filed, held the income tax provisions entirely valid except for one minor provision which it held to be invalid under the Constitution of the State of Nebraska. The latter holding is not involved in this appeal. The Nebraska Supreme Court affirmed in all respects.

In this appeal three federal issues are raised. All three of these issues were raised from the beginning in pleadings in the District Court of Lancaster County, Nebraska, specifically and in detail, naming the federal constitutional provisions claimed to be violated, in Paragraphs 17 and 9 of the petition on which the case was tried. They were discussed at length in the briefs of the appellants at all stages and are discussed in the opinion of the Supreme Court of Nebraska, though the latter opinion does not answer a number of specific contentions made by the appellants.

THE QUESTIONS ARE SUBSTANTIAL

1. The "Food Sales Tax Credit" provisions allow a very

substantial credit to all residents of Nebraska but deny it to all nonresidents, thus discriminating against nonresidents, in violation of Article IV, Section 2, and the due process, privileges and immunities, and equal protection clauses of the Fourteenth Amendment and the Travis decision by this Court and a long line of unanimous authority in numerous jurisdictions.

Section 15(1) of the Nebraska Bill imposes an income tax on all residents of the state and upon nonresident individuals as to income derived from sources within Nebraska. As shown in the quoted portion of the Bill set forth earlier in this Jurisdictional Statement, Section 15(3)(a) allows a credit of $7.00 against tax multiplied by the number of allowable personal exemptions—but allows this credit only to residents, denying it to nonresidents. It further provides that a refund be allowed to residents to the extent that the credit exceeds the income tax payable by the resident, but denies such refund to nonresidents.

It should be stressed that this credit, called a "food sales tax credit" is a very substantial credit indeed. For a family of five it means a credit of $35.00. For a state tax rate set at ten per cent of the federal (the percentage currently set), it would be necessary for a family to earn sufficient income to owe $350.00 in federal income taxes before a state income tax would be owing. The federal income tax rate schedule shows that a family of five could earn $6,100 a year before it would be required to pay a $350 federal income tax and a $35.00 state income tax, so after applying the credit, unless a family of five earned in excess of $6,100 a year it would currently pay no Nebraska income tax at all. This would mean that approximately one half of the families of Nebraska are excluded from paying any state income tax at all because of the "food sales tax credit" provisions under the rate currently set.

Appellants Etherington and Bray are nonresidents of Nebraska, residing in Council Bluffs, Iowa, though they work full time in Omaha, Nebraska, each receiving annual income in excess of $6,000, each of them eating a substantial number of meals in Nebraska subject to Nebraska sales tax and substantial additional meals in Nebraska with their families, similarly taxed. The families of each of these appellants purchase between $500 and $1,000 per year in items purchased in Nebraska subject to Nebraska sales tax. No contention was raised by the defendants that these appellants did not show sufficient interest to challenge the constitutionality of the Nebraska income tax, nor did the Nebraska Supreme Court in its opinion so hold.

As shown in the statutory provisions earlier quoted in this Jurisdictional Statement, every person who maintains a permanent abode in Nebraska, spending in the aggregate more than six months of the taxable year in Nebraska is as the Nebraska Supreme Court opinion states "conclusively presumed" to have paid sales and use taxes equal to the maximum food sales tax credit allowable, so that all Nebraska residents receive the credit. Yet, the statutory provisions flatly exclude nonresidents from receiving this credit regardless how much taxes are paid by the nonresidents, including sales taxes and sales taxes upon food.

Such being the situation, it is the position of the appellants that the so-called "food sales tax credit" has absolutely nothing to do with sales tax on food or sales tax generally. Rather, the test is a person's residence—he receives the credit if he is a resident and he is excluded if he is a nonresident. Thus the term "food sales tax" is strictly surplusage and it would be more accurate to call the credit a "residence tax credit" since residence is the test. There will of course be some nonresidents of Nebraska residing outside the state yet who work in Nebraska

such as the plaintiffs Etherington and Bray, who will pay income tax upon the full amount of their income and will also pay very substantial Nebraska sales taxes. They are excluded from receiving the credit, though their co-workers, who are Nebraska residents, will receive the full credit.

As a practical matter the so-called food sales tax credit would operate exactly the same way whether or not Nebraska had a sales tax or a tax on food.

The decisions *unanimously* strike down the granting by states of tax credits to residents while denying them to nonresidents.

16A C. J. S., Constitutional Law Section 478b, page 222, states in the heading to that sub-section as follows:

> "b. Discrimination against Nonresidents
> "Any tax law which discriminates against nonresidents as such, in the rate of taxation, the mode of assessment and enforcement, and the allowance of exemptions abridges the constitutional provisions as to privileges and immunities of citizens."

To like effect see 16 American Jurisprudence 2d, Constitutional Law, Section 516, page 902.

Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 40 S. Ct. 228, 229, 64 L. Ed. 460 (1920), is the leading case on this subject.

In the *Travis* case, New York imposed an annual tax on both residents and nonresidents. Certain exemptions were given to resident taxpayers but in practical effect no exemption was given to nonresidents. The exemptions given to residents were $1,000 for a single person, $2,000 for a married person, and $200 for each additional dependent. The court said: "A nonresident taxpayer has no similar exemptions; * * *." The court found that this was a

case of inequality "operating to the disadvantage of all nonresidents including those who are citizens of neighboring states, and favoring all residents including those who are citizens of the taxing state." The court held that there accordingly had been a denial of the privileges and immunities guaranteed by the federal Constitution. Several dozen cases running up to the last year have cited *Travis* with approval, none with disapproval.

State v. Ashby, 387 P. 2d 588 (N. M. 1963), is squarely in point. In this case, action was brought by the state against a nonresident employee of a New Mexico military installation to require him to file a New Mexico state income tax return. The court held the New Mexico Income Tax Act unconstitutional in providing personal exemptions for residents but not providing the same exemptions for nonresidents. This was held to be a violation of the privileges and immunities clause of the federal Constitution and the equal protection clause of the Fourteenth Amendment.

The New Mexico Income Tax Act provided personal exemptions to residents of $1500 to unmarried persons, $2,500 to a husband and wife, plus $200 for each dependent minor child. There were no exemptions allowed to nonresidents.

The court discussed the *Travis* case, supra, and then stated:

> "We see no way to avoid a conclusion under the doctrine of the Travis case, relied on by appellant, that having imposed the tax upon 'every resident and non-resident' * * *, the failure to extend exemptions granted residents * * * to non-resident taxpayers brings the New Mexico act into conflict with art. IV, § 2, of the Constitution of the United States."

Also squarely in point is *State v. Berntsen,* 200 P. 2d

1007 (Ida. 1948). In the latter case Idaho brought action to recover income taxes from the defendants, husband and wife, who were residents of the state of Washington, though the defendant husband was employed in Idaho. The taxpayers acknowledged that they could be required to pay Idaho income tax even though they were nonresidents since the taxpayer husband was employed in Idaho. However, they contended that the Idaho income tax legislation was unconstitutional in that the law gave Idaho residents more exemptions against net income than were given to nonresidents.

The court held in favor of the taxpayers, that such discrimination violated the privileges and immunities clause of the federal Constitution. Under the Idaho income tax statute, Idaho residents were given a credit against net income of $1,500 in the case of a husband and wife and $200 for each dependent. Nonresidents in the same circumstances were given a credit of only $500.

The Idaho court so held in accordance with the *Travis* case, supra. It quoted at great length from the *Travis* case and concluded that "under the foregoing authorities, the statute as now written, insofar as it imposes a tax upon these non-resident defendants, is unconstitutional and void for violating Section 2, Article IV of the United States Constitution." (200 P. 2d 1010)

In *Borden v. Selden,* 146 N. W. 2d 306 (Iowa 1966), the Iowa legislature appropriated a state fund which was to be apportioned as a credit against taxes owing on agricultural lands but gave this credit only to residents of the state of Iowa. The court held, citing the *Travis* case as authority, that such was an unconstitutional discrimination against nonresidents. The court noted that the legislation "clearly distinguishes between owners of Iowa agricultural land solely on the basis of residence

and discriminates in favor of Iowa residents and against nonresidents." In holding the law unconstitutional, the court rejected the contention that it was proper to favor residents because of their "closer identity with the community and state." It also rejected the contention that residents participated more in the government of the state and *that they pay more sales taxes, even though, as in the instant case, the funds used to pay for the credit were claimed to come partly from sales tax.* The Iowa tax thus could, as here, have been called a "food sales tax credit."

The opinion added that the taxpayer in addition would be paying these or equivalent taxes to the state of his residence to help support the government of that state. "Denying him the land tax credit would not be tax equalization but in fact would burden him with a greater portion of the cost of the Iowa school system than his resident neighbor."

Finally, the court commented that though the "credit involved" was small, when converted into a percentage figure it meant that nonresident plaintiffs would pay from *ten* per cent to *eighteen* per cent more taxes than the residents situated similarly. The court said that *"This is a substantial difference."* 146 N. W. 2d at 314.

In *Burge v. Marcum,* 394 S. W. 2d 908 (Ky. 1965), the Kentucky court rejected the contention that it was proper to discriminate because nonresidents pay fewer taxes. The court held unconstitutional, under both the federal and state constitutions a state statute which provided that "All shares of stock in corporations organized under the laws of this state, belonging to a person whose domicile is in a country foreign to the United States or its possessions, shall, on the death of the owner, be subject to a tax of five percent. * * *" Cited as authority is the *Travis*

case. The court held that the tax unfairly discriminated against persons domiciled in a foreign country, that the latter may pay taxes in the foreign country, there thus being "double taxation."

In *Opinion of the Judges*, 140 N. W. 2d 34 (S. D. 1966), South Dakota had passed a "Property Tax Relief Act" under which certain funds were appropriated and placed in a Property Tax Relief Fund, to be returned to the taxing districts, to be used as a "credit" on the real and personal property taxes paid by residents of the state, though the credit was not available to nonresidents. The South Dakota Supreme Court held this tax credit to be in violation of the federal Constitution, citing as authority the *Travis* case. In so holding the court stated as follows at 140 N. W. 2d 35-6:

> "There is no reasonable basis for the discrimination contained in House Bill 707. It is based solely upon residence, and to the extent of credit or refund imposes a higher tax upon the citizens of other states than is imposed on our own. Consequently, we are compelled to advise you that the bill in question violates the quoted provisions of the Constitution of the United States and is, in our opinion, *clearly unconstitutional.*"

A long list of additional cases supporting appellants' contention will be cited if probable jurisdiction is noted here.

The opinion by the Nebraska Supreme Court in upholding the validity of the "food sales tax credit" acknowledges that as far as the Court can determine "this is a case of first impression" as to the validity of such credit. In upholding the validity of the food sales tax credit, the basis of the court's opinion is that "generally a state sales tax on food for personal use will be paid almost universally by residents of the state, while purchases of such food in the states by nonresidents are ordinarily minimal." This same

contention has been used in several of the above-cited cases in trying to uphold the validity of the discrimination involved in those cases. Such a contention could always be made where advantages are given to residents in tax statutes but denied to nonresidents—yet the decisions have unanimously stricken down such discrimination.

The Nebraska Supreme Court opinion also mentions "practical legislative and administrative reasons" for giving a food sales tax credit instead of exempting certain foods from sales tax. The opinion mentions the difficulty in defining foods and the difficulty to retailers collecting the tax in separately computing which items are subject to food tax and which are not. The court concludes that there is a valid classification between residents and nonresidents as to taxes on food sales.

However, granted that there are administrative problems to a retailer if food items were exempted from sales tax, the opinion fails completely to explain what administrative problems prevent *giving the credit to nonresidents* as well as residents. Nonresidents such as plaintiffs Etherington and Bray could be allowed to show on their state income tax returns by affidavit or otherwise the amount of sales tax they have paid on food purchases during the year so to the extent that they have paid a sales tax on food, they can claim a credit accordingly. Such should cause no more administrative problems than the large number of deductions which a taxpayer claims on his federal income tax return for state sales taxes he has paid and for charitable and church donations, medical expense, etc. etc. Many nonresidents will pay substantial Nebraska income tax from the mere fact that they are in the state to earn such income. Mere possible administrative problems in handling the food sales tax credit as to nonresidents does not justify such discrimination which arbitrarily allows this substan-

tial credit to residents and arbitrarily denies it to all nonresidents.

Finally, the Nebraska Supreme Court opinion states that the food sales tax credit is a "personal credit" as to which a state should be allowed to discriminate between residents and nonresidents. The New York case cited in the Nebraska Supreme Court opinion merely upheld the validity of a tax which allowed residents to deduct certain personal expenses but did not allow such deduction to nonresidents. This is the closest that any decision has gone toward allowing discrimination against nonresidents, but falls far short of the food sales tax credit here involved.

The food sales tax credit here involved is in its practical effect on the state tax owing no different than the exemptions allowed in the *Travis* case or in the New Mexico and Idaho income tax cases above cited where discriminatory exemptions were stricken down. Whether a dollar amount is applied as an exemption against income or a credit against tax, the end result is identical.

2. A state law which adopts future Federal laws constitutes an unlawful delegation of State legislative power to the Federal Congress, contrary to the Tenth and Fourteenth Amendments to the United States Constitution.

Decisions of the courts of the various states are practically unanimous in striking down state statutes which adopt future federal laws, holding them unconstitutional as delegating state legislative power to the federal government. Cases so holding include the following: *Smithberger v. Banning*, 129 Neb. 651, 262 N. W. 492 (1935) (public relief appropriations); *Crowly v. Thornbrough*, 294 S. W. 2d 62 (Ark. 1956) (state wage rates to be based on

federal wage rates); *Idaho Saving & Loan Association v. Roden,* 350 P. 2d 225 (Ia. 1960) (state savings and loan associations to conform with rules of federal Housing Act); *Seale v. McKennon,* 336 P. 2d 340 (Ore. 1959) (state adopting federal agricultural laws); *Dawson v. Hamilton,* 314 S. W. 2d 532 (Kent. 1958) (state uniform standards of time based on Federal standards); *State v. Urquhart,* 310 P. 2d 261 (Wash. 1957) (state medical license based on federal rules, etc.); *Dearborn Independent v. City of Dearborn,* 49 N. W. 2d 370 (Mich. 1951); *Florida Industrial Commission v. State,* 21 S. 2d 599 (Fla. 1945) (state unemployment compensation law making reference to federal social security act); *City of Cleveland v. Piskura,* 60 N. E. 2d 919 (Ohio 1945) (city ordinance basing ceiling prices on those fixed by Federal government); *Hutchins v. Mayo,* 197 So. 495 (Fla. 1940) (state fruit grading standards based on those fixed by federal Department of Agriculture); *Holgate Bros. Co. v. Bashore,* 200 Atl. 672 (Pa. 1938) (state statute prescribing maximum periods of labor based on federal regulations); *Brock v. Superior Court,* 71 P. 2d 209 (Cal. 1937); and *State v. Webber,* 133 A. 738 (Me. 1926) and *State v. Intoxicating Liquors,* 117 A. 588 (Me. 1922) (state liquor laws based on federal).

Following are decisions holding it unconstitutional for a state income tax law to adopt part or all of federal income tax legislation, including future changes: *Head v. McKenney,* 6 S. E. 2d 405 (Ga. 1939); *Featherstone v. Norman* (Ga. 1930), 153 S. E. 58; *Commonwealth v. Warner Bros. Theatres, Inc.* (Pa. 1942), 27 A. 2d 62; *Santee Mills v. Query,* 115 S. E. 202 (S. C. 1922).

The great majority of the above decisions merely hold that a state statute adopting future federal laws is "unconstitutional" without stating specifically whether there is a violation of the federal Constitution, state Constitution, or

both. Presumably these decisions find both Constitutions violated. There are no decisions by this Court as to whether a state statute which adopts future federal laws is a violation of the Constitution of the United States.

There is ample authority that a state law adopting a future federal law violates the federal Constitution. It is the position of the appellants here that the mere fact that the Constitution of the State of Nebraska has been amended to allow the state legislature to base its state income tax laws on future federal laws does not remove the federal constitutional objection, so that the Nebraska income tax legislation must be stricken down under the federal Constitution.

Nebraska's *Smithberger* case, supra, held that there is a violation both of the Nebraska Constitution and the Fourteenth Amendment to the federal Constitution in a Nebraska legislative act which adopted a future law of Congress.

Darweger v. Staats, 275 N. Y. S. 394 at 401 states that holding constitutional a state legislative act which adopts future federal legislation "seems contrary to the plain language and import of our *fundamental laws, both national and state.*" *Opinion of the Justices,* 239 Mass. 606, in holding unconstitutional a state statute adopting future federal laws states that "It would be destructive of fundamental conceptions of government through republican institutions for the representatives of the people to abdicate their exclusive privilege and obligation to enact laws."

Darweger v. Staats, supra, further states that a state statute attempting to delegate legislative authority to the federal government was not only in violation of the New York Constitution but was also "contrary to every principle upon which our republican institutions are based."

In *Knickerbocker Ice Co. v. Stewart,* 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, there was before the Court a congressional act which allowed the workmen's compensation laws of the several states to apply to injuries within the federal admiralty and maritime jurisdiction. The Court held that this law was an unlawful delegation of *federal* congressional authority to the states and was accordingly unconstitutional. The Court said that:

> "We think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedy for their enforcement, arises from the Constitution, as above indicated. * * * The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. * * * *Congress cannot transfer its legislative powers to the states—by nature this is non-delegable.*"

This is a reverse of the situation involved in the instant case. There can be neither delegation of legislative authority to the federal government, nor delegation by the federal government to the states.

In *Carter v. Carter Coal Co.,* 298 U. S. 238, 56 S. Ct. 855, this Court held unconstitutional the Bituminous Coal Conservation Act. At 298 U. S. 295, 56 S. Ct. 866 the Court discussed at length the sovereign powers of the states under the Tenth Amendment. The Court stated:

> "The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerges from the history of their deliberations. And *adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated on the one hand nor abdicated on the other.* As this court

> said in Texas v. White, 7 Wall. 700, 725, 19 L. Ed. 227, 'The *preservation of the States,* and the maintenance of their governments, *are as much within the design and care of the Constitution as the preservation of the Union* and the maintenance of the National government. * * *.'"

It is a well-recognized rule of law, cited in a multitude of cases, that there is a constitutional violation where a state legislature gives to a state administrative official legislative powers, this constituting an unlawful delegation of such powers. Such unlawful delegation is recognized to violate the state constitutions and also the Fourteenth Amendment to the Constitution of the United States. See 92 A. L. R. 400, 54 A. L. R. 1104, 12 A. L. R. 1435 and 42 Am. Jur., Public Administrative Law, Section 45, Page 342.

If there is a violation of the federal Constitution where a state statute delegates state legislative power to a *state* official, there would be a far more serious violation of the federal Constitution for a state to delegate its legislative power to a *different sovereign,* the United States government. Such constitutional objection cannot be removed simply by amending a state constitution.

The answer in the instant opinion of the Nebraska Supreme Court is to cite *Alaska Steamship Co. v. Mullaney,* 180 F. 2d 805 (C. A. 9, 1950), the sole modern case upholding the constitutionality of a law which adopts future federal income tax laws. However, the *Alaska Steamship Company* case is not in point since it involved a territorial income tax law of the Territory of Alaska, not a state law enacted by a sovereign state. Thus what that decision says in regard to a *federal territory* adopting the future federal income tax laws has little or no bearing on the federal constitutional question of whether a sovereign state

can lawfully delegate its legislaltive powers to the federal government.

3. The compact between the United States and the State of Nebraska at the time of its admission into the union required that it have a "republican" form of government. Such requirement is violated by the Nebraska Income Tax Law, which bases the State income tax paid on the Federal income tax laws of the future, thereby delegating State legislative authority to the Federal government, defined to be contrary to "republican" requirements. Such is further a violation of Article IV, Section 4 of the United States Constitution.

When Nebraska was admitted into the Union, the Enabling Act of Congress, which appears in Volume 2 of the Revised Statutes of Nebraska, Reissue of 1964, Page 5 stated in Section 4 thereof that as to one of the conditions for admitting Nebraska into the Union, that the Nebraska Constitution "when formed shall be republican, and not repugnant to the constitution of the United States and the principles of the Declaration of Independence."

Further proceedings as to the admission of Nebraska follow in the same volume of the Statutes and again state as a condition of admission that Nebraska be "republican" in its form of government.

Article IV, Section 4 of the Constitution of the United States provides that:

> "Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, * * *."

Opinion of the Justices, supra, struck down a state law which adopted future federal laws. The Massachusetts

court in speaking of "legislative power" states that "It is a power which cannot be surrendered or delegated or performed by any other agency. The enactment of laws is one of the high prerogatives of a sovereign power. It would be destructive of fundamental conceptions of government through *republican* institutions for the representatives of the people to abdicate their exclusive privilege and obligation to enact laws."

Darweger. v. Staats, 267 N. Y. 290, holds that a New York statute which adopts future federal laws is "contrary to every principle upon which our *republican* institutions are based."

The separation of federal and state powers is fundamental to our United States Constitution. The long list of state cases cited earlier shows the concern by our state courts that the states do not turn their sovereign powers over to the federal government.

In *Opinion of the Judges,* 140 N. W. 2d 34 (S. D. 1966), the court held unconstitutional a state taxation statute which discriminated against non-residents. In the course of this discussion the court noted that the South Dakota enabling act, by which South Dakota became a state, agreed that lands belonging to citizens of the United States residing in South Dakota "shall never be taxed at a higher rate than the lands belonging to residents thereof." The court held that "This provision was subsequently embodied in our Compact with the United States, now Article XXII of our Constitution. *It cannot be revoked without the consent of the United States.*"

The sole basis of the Nebraska Supreme Court opinion ruling against this contention is that there is no delegation of legislative power *since the Nebraska Legislature even*

after enacting the income tax law retains the power to repeal it. The opinion implies that as long as a state retains the power to change its laws there is no violation of the requirement of a "republican" (the opinion uses the term "representative") form of government.

Appellants respectfully submit that the opinion of the Nebraska Supreme Court not only fails to meet the argument of appellants, but further employs an argument impliedly rejected by the long list of cases cited in this Jurisdictional Statement. In these cases the courts have stricken down state statutes which adopt future federal legislation *even though in each instance the state retained the power to repeal the law which adopted the federal laws.* There is an unlawful delegation of state legislative power the moment a state enacts a law adopting future federal laws, regardless what happens thereafter.

THE QUESTIONS ARE IMPORTANT.

1. As for the food sales tax credit, if such provisions are allowed to stand, other states will doubtless follow. The food sales tax credit appears to be squarely contrary to the decision of this Court in the *Travis* case, supra, and in large number of cases in various jurisdictions which have followed the *Travis* case.

2. As for adopting future federal laws, the federal question involved is very substantial in view of the large and increasingly larger number of state statutes enacted which attempt to adopt federal laws. Two states in addition to Nebraska not only have enacted state income tax laws based on future federal income tax laws, but also have passed state constitutional amendments authorizing this to be done. These are New York (Article III, Section 22) and Colorado (Article X, Section 19).

3. As for the requirement of a "republican" form of government, it is a fundamental question of constitutional law as to how far the states are to be allowed to delegate their powers to the federal government, yet have a "republican" form of government.

CONCLUSION

Appellants respectfully submit that the Court should note probable jurisdiction.

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APPENDIX A

OPINION OF THE SUPREME COURT OF NEBRASKA

PHILIP C. ANDERSON ET AL., APPELLANTS, V. NORBERT TIEMANN ET AL., APPELLEES.

— N. W. 2d —

Filed December 22, 1967. No. 36810.

1. **Constitutional Law.** Each and every clause in a constitution has been inserted for some useful purpose.
2. **Constitutional Law, Construction of.** Constitutional provisions should receive even broader and more liberal construction than statutes. and constitutions are not subject to rules of strict construction.
3. **Statutes: Courts.** Where a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional, it is the duty of the court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid.
4. **Constitutional Law: Taxation.** The constitutional amendment, Article VIII, section 1B, adopted by the electorate in November 1966, grants to the Nebraska Legislature the authority to enact income tax legislation which adopts by reference future income tax laws of the United States as they become effective; and the provisions of L.B. 377, of the 1967 Legislature, with reference thereto are valid.
5. **Statutes: Taxation.** The adoption of a state income tax based upon present and future federal income tax laws does not constitute a waiver of the sovereignty of the state nor an abdication of its functions nor constitute a violation of the requirements of a representative form of government.
6. **Administrative Law: Constitutional Law.** The rule-making authority granted to the Tax Commissioner by L.B. 377, of the 1967 Legislature, is a valid and lawful delegation of authority, and does not violate the Constitution of Nebraska nor of the United States.
7. ———: ———. L.B. 377, of the 1967 Legislature, constitutes a valid and lawful delegation of authority to the State Board of Equalization and Assessment and does not violate the Constitution of Nebraska nor of the United States.
8. ———: ———. L.B. 377, of the 1967 Legislature, does not unconstitutionally delegate judicial power to the Tax Commissioner.
9. **Constitutional Law: Taxation.** Article VIII, section 1, of the Constitution of Nebraska, does not prohibit a graduated state income tax.
10. ———: ———. A franchise tax based upon or measured by the

income of a corporation is not a property tax within the meaning of Article VIII, section 1, of the Constitution of Nebraska.

11. ———: ———. A tax classification, though discriminatory, is not arbitrary nor violative of the equal protection clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it.

12. Constitutional Law: Citizens. The privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it.

13. Constitutional Law: Taxation. The allowance and limitation of the food sales tax credit only to residents does not constitute unjust or unreasonable discrimination under the privileges and immunities and equal protection clauses of the Fourteenth Amendment.

14. Constitutional Law: Statutes. L.B. 377, of the 1967 Legislature, contains but one general subject, taxation, and does not violate Article III, section 14, of the Constitution of Nebraska, providing that no bill shall contain more than one subjeect.

15. Constitutional Law: Courts. This court will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected. The courts will not set aside a law as violative of the Constitution for the reason that there is a possibility that one's interest may be injuriously affected in the future.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Ray C. Simmons, for appellants.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

McCOWN, J.

The plaintiffs seek a declaratory judgment holding of L.B. 377, sections 14 through 137, enacted by the 1967 Legislature, unconstitutional and totally void insofar as it relates to the state income tax, and enjoining the defendants from enforcement. Plaintiffs include domestic corporations and both resident and nonresident individuals. Defendants are various officials of the State of

Nebraska. Issues were joined on a demurrer, stipulation of facts, and a later motion for summary judgment. The district court held that sections 14 to 137, L.B. 377, were valid in all respects, with one exception dealing with a portion of section 115 which was held invalid but severable, and dismissed the plaintiffs' petition.

L.B. 79 of the 1965 session of the Nebraska Legislature provided for the submission of a constitutional amendment on a state income tax to a vote of the people. That constitutional amendment was submitted to and approved by the electorate at the general election in November 1966. The amendment to Article VIII provides: "Sec. 1B. When an income tax is adopted by the Legislature, the Legislature may adopt an income tax law based upon the laws of the United States."

L.B. 377, designated as the "Nebraska Revenue Act of 1967," contains three general subdivisions. Sections 2 through 13 are designated (a) Sales and Use Tax; sections 14 through 124 are designated (b) Income Tax; and sections 125 through 137 are designated (c) General Provisions.

Section 14, the first section of the income tax subdivision, expressly provides in part: "Any term used in sections 14 to 124 of this act shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required. Any reference to the laws of the United States shall mean the provisions of the Internal Revenue Code of 1954, and amendments thereto, other provisions of the laws of the United States relating to federal income taxes, and the rules and regulations issued under such laws, *as the same may be or become effective, at any time or from time to time, for the taxable year.*" (Emphasis added.) Other sections of the act make similar references.

The plaintiffs' first contention is that those provisions of L.B. 377 which attempt to make future laws of the United States relating to the federal income tax

automatically effective as a part of the state income tax law are unconstitutional. Such action by the Nebraska Legislature is challenged as an unlawful delegation of legislative power to the United States in violation of Article II, section 1, Article III, section 1, of the Constitution of Nebraska.

It is conceded that the Nebraska Legislature may lawfully adopt by reference an existing law or regulation of another jurisdiction including the United States. Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227.

In 1935, this court held that a statute appropriating funds to be expended under the terms and conditions provided by an act of the Congress of the United States to be passed in the future, is an unconstitutional attempt on the part of the Legislature to delegate legislative authority to the Congress of the United States. Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492. That case has not been overruled, and remains law in this jurisdiction, except as it may be affected by the constitutional amendment quoted above. The constitutional amendment having been adopted subsequent to the Smithberger case, necessitates an interpretation of the constitutional amendment and a determination as to whether that amendment granted the Legislature the authority, in adopting a state income tax law, to adopt future laws of the United States as they may be or become effective.

The plaintiffs' position is that the words "based upon" in the constitutional amendment connote only something already in existence or effect. The argument is that since the Legislature already possessed power to adopt existing laws of the United States by reference, nothing was changed by the constitutional amendment and, in effect, it was a useless gesture. We cannot agree.

The term "base" in Webster's Seventh New Collegiate Dictionary is defined as: "The point or line from which a start is made in an action or undertaking" or "The fundamental part of something." Webster's Twentieth Century Dictionary, unabridged (2d Ed.), contains among others, the definitions: "The foundation or most

important element, as of a system or set of ideas" and "Anything from which a start is made; basis."

The specific language of the amendment standing alone does not expressly state that future changes are to be included nor does it restrict the application to present laws only: Judicial interpretation is, therefore, required.

On the basis of the legislative history of L.B. 79 of the 1965 Legislature which submitted this amendment to the people, the trial court specifically found that: "* * * it was the intent of the legislature that power be given it by the Amendment to adopt the laws of the United States *with future changes*. The statements of two Senators support this and no statement is contained in the legislative history before the Court expressing a contrary intention."

This court has also recognized the principle of constitutional interpretation that each and every clause in a constitution has been inserted for some useful purpose. Constitutional provisions should receive even broader and more liberal construction than statutes, and constitutions are not subject to rules of strict construction. Carpenter v. State, 179 Neb. 628, 139 N. W. 2d 541.

In State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N. W. 2d 63, this court stated: "Where a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional, it is the duty of the court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid."

The cumulative effect of all these considerations is convincing. We think the clear purport and intent of the constitutional amendment was to grant the Legislature the authority to do exactly what it did. We hold that the constitutional amendment, Article VIII, section 1B, adopted by the electorate in November 1966, grants to the Nebraska Legislature the authority to enact income tax legislation which adopts by reference future income tax laws of the United States as they become effective and the provisions of L.B. 377 with reference thereto are valid.

The plaintiffs also contend that any such delegation of legislative authority to the United States violates the requirements of a representative form of government imposed by the enabling legislation admitting this state to the Union. By implication, the argument is that even though there was specific state constitutional authority, an adoption of future laws of the United States would still constitute an unconstitutional delegation of legislative authority. The additional implication is that such delegation implies an abdication or waiver of the sovereignty of the state and is, therefore, constitutionally prohibited.

Insofar as the briefs indicate, this is a case of first impression on the issue of whether a state can, by constitutional amendment and subsequent legislative action, adopt present and future income tax laws of the United States, and essentially make the claims for state income tax contingent upon, and correlative with, the establishment of liability for federal income tax. However, the general issue was considered by the 9th Circuit Court of Appeals in the case of Alaska Steamship Co. v. Mullaney, 12 Alaska 594, 180 F. 2d 805 (1950). Although Alaska was at that time a territory, under its organic act, it had the privilege of legislating, including the levying and collecting of taxes and revenue, in much the same manner as a state. The legislative design of basing the income tax on the federal income tax law as then in existence or thereafter amended, and calculating the state income tax as a percentage of the federal income tax was essentially the same. The court in that case stated: "We think it is far from clear that any invalid delegation is attempted. There are of course many cases which have held attempts by a legislative body to incorporate provisions into its enactments by reference to future acts or amendments by other legislatures, to be invalid. But where it can be said that the attempt to make the local law conform to future changes elsewhere is not a mere labor-saving device for the legislators, but is undertaken in order to attain a uniformity which is in itself an important object of the pro-

posed legislative scheme, there are a number of precedents for an approval of this sort of thing. * * * The effort of the Alaska legislature to make its territorial income tax machinery conform to the federal act, and to preserve and continue such conformity, makes sense. It makes for convenience to the taxpayer and for simplicity of administration. (Citing cases.) A similar coordination has been recommended by students of income tax problems for adoption by the states generally. Since the attainment of this uniformity was in itself a major objective of the Alaska legislature, in enacting that the local law must conform, the Alaska legislature, which alone could make this decision, was itself acting, and was not abdicating its functions, nor, in our opinion, making an invalid delegation to Congress."

Since Alaska became a state, its Supreme Court has approved the basic foundation of the Alaska act, "* * * which was to make the state's claim for income taxes contingent upon the establishment of liability for federal income taxes." The court also referred to "the prime objective of the Alaska statute which was aimed at convenience to the taxpayer and simplicity of administration." Hickel v. Stevenson (Alaska), 416 P. 2d 236 (1966).

The constitutional amendment with which we are dealing does not require, but only authorizes, the Legislature to base a state income tax law upon the laws of the United States. In connection with a state income tax law, we think it permits the Legislature to use all, part, or none of the laws of the United States as it may determine from time to time appropriate insofar as it may be lawful and practicable to do so. It does not preclude the Nebraska Legislature from repealing its own present enactment or adopting a completely different method of imposition of its income tax, and the Legislature retains the complete legislative power to make all such decisions. The adoption of a state income tax based upon present and future federal income tax laws does not constitute a waiver of the sovereignty of the state, nor an abdication of its functions, nor con-

stitute a violation of the requirements of a representative form of government.

The plaintiffs' next major issue involves the contention that L.B. 377 unconstitutionally delegates legislative authority and judicial powers to the Tax Commissioner. Section 119 of L.B. 377 provides in part: "(1) The Tax Commissioner shall administer and enforce the income tax imposed by this act and he is authorized to make such rules and regulations and to require such facts and information to be reported, as he may deem necessary to enforce the income tax provisions of this act; Provided, that such rules, regulations and reports shall not be inconsistent with the laws of this state or the laws of the United States."

The laws of the United States adopted by reference in L.B. 377 include the Internal Revenue Code, Regulations of the Internal Revenue Department, and court decisions interpreting them. See Estate of Willett v. Commissioner of Internal Revenue, 365 F. 2d 760 (5th Cir. 1966).

The dividing line between constitutional and unconstitutional delegation of legislative power under the decisions of many states, including our own, is difficult to determine exactly. For an extensive discussion of delegation of legislative power and a review of cases on the issue at both federal and state levels, see Louis L. Jaffe, An Essay on Delegation of Legislative Power, 47 Colum. L. Rev., part I at page 359 and part II at page 561.

This court has held: "The Legislature does have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations. Such authority is administrative in its nature and its use by administrative officers is essential to the complete exercise of the powers of all departments." Lincoln Dairy Co. v. Finigan, *supra*. That case also reiterated the rule stated by this court in Board of Regents v. County of Lancaster, 154 Neb. 398, 48 N. W. 2d 221: "The exercise of a legislatively-delegated authority to

make rules to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law with designated limitations is not an exclusive legislative power. It is administrative in its nature and its use by administrative agencies is usually essential to the complete and wise exercise of the power in the accomplishment of the purpose which the Legislature intended. Consuquently, the courts are not inclined to interfere with rules established by legislative direction where they bear a reasonable relation to the subject of the legislation and constitute a reasonable exercise of the powers conferred."

L.B. 377 imposes express limitations on the rule-making authority granted to the Tax Commissioner. The rules and regulations are restricted in character to those which are to enforce the income tax laws of this state and including by reference the laws of the United States relative thereto. The rules and regulations must also be consistent with both state and federal laws.

Delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of continuous decision. The federal income tax structure comprises a comprehensive, cumulative, and currently functioning body of law in the income tax field. In the area of state income taxation, whether based on federal law or otherwise, it is quite apparent that the complicated and continuous task, if it is to be done at all, must be delegated. Where the Legislature has settled the guiding principles and standards of policy, and has provided the precision and due process which can obviously not be fully obtained in the basic legislation, the act should be upheld. The rule-making authority granted to the Tax Commissioner by L.B. 377 of the 1967 Legislature, is a valid and lawful delegation of authority, and does not violate the Constitution of Nebraska nor of the United States.

The plaintiffs' contentions with respect to unconstitutional delegation of legislative power extend also to the provisions of L.B. 377 which require the State Board

of Equalization and Assessment to set the rate of tax on or before November 15 of each year for the taxable year beginning during the subsequent calendar year. Section 15 of L.B. 377, in at least five subsections, explicitly sets out the computations to be made by the state board, the method and manner in which the computations shall be adjusted and determined, and the specific standards to be used in setting the rate of tax. The discussion as to delegation of legislative authority to the Tax Commissioner and the rules set out above also apply with respect to the delegation of authority to the State Board of Equalization and Assessment. L.B. 377 constitutes a valid and lawful delegation of authority to the State Board of Equalization and Assessment and does not violate the Constitution of Nebraska nor the United States.

Basically the same issues are involved with respect to delegation of judicial power. Article V, section 1, of the constitution, vests judicial power in the tribunals therein named but also gives to the Legislature the power to create other courts inferior to the Supreme Court. However, L.B. 377 does not create a court but does grant to a state official or administrative body quasi judicial powers. Powers of the same general nature and character are conferred upon many administrative bodies. Such duties are of a quasi judicial nature and yet such bodies are almost invariably held to be administrative. See Dawson County Irr. Co. v. McMullen, 120 Neb. 245, 231 N. W. 840. The conferring upon state agencies or officers, of executive or administrative functions requiring the exercise of quasi judicial powers, does not conflict with the constitutional provisions regarding officers and bodies upon whom judicial power may be conferred. This is particularly true where such powers and duties relate to matters which are peculiarly affected with a public interest and where provision is made for appeal from decisions of such officers or agencies to the courts. L.B. 377 does not unconstitutionally delegate judicial power to the Tax Commissioner.

The plaintiffs also contend that a state income tax

based upon the amount of federal income tax is a graduated tax because the federal tax is graduated, and, therefore, it is not levied uniformly and proportionately as required by the Constitution of Nebraska. It should only be necessary to point out that the same constitutional section, Article VIII, section 1, specifically provides that taxes other than property taxes may be authorized by law. The specific constitutional amendment dealing with the state income tax, even if interpreted as limiting the legislative authority to existing federal law, would permit a graduated income tax even if there were otherwise a question.

Plaintiffs also contend that the "franchise tax" is a property tax, is not levied by valuation uniformly and proportionately, and is invalid because of a 1966 constitutional amendment prohibiting the state from levying a property tax for state purposes. Section 34 (2) of L.B. 377 imposes a tax: "* * * for the privilege of exercising its franchise or doing business in this state in a corporate capacity * * * according to or measured by its entire net income derived from all sources within this state for the taxable year." Although referred to as a "franchise" tax, where such a tax is based upon or measured by the income of a corporation, it is almost universally held to be an excise tax or privilege tax and not a property tax within the meaning of similar constitutional provisions of other states. See Annotation, 71 A. L. R. 256. The constitutional objections raised by the plaintiffs as to validity on these issues cannot be sustained. L.B. 377 does not violate Article VIII, section 1, of the Constitution of Nebraska, requiring taxes to be levied by valuation uniformly and proportionately upon all tangible property and franchises, and prohibiting the state from levying a property tax for state purposes.

The plaintiffs likewise contend that the provisions of section 15 (3) of L.B. 377 which allow a "food sales tax credit" only to residents violates both the privileges and immunities clause and the equal protection clause of the Fourteenth Amendment. So far as we can determine,

this is a case of first impression in this country as to the validity of such a "food sales tax credit."

It is clear that the food sales tax credit, although set out in the income tax portion of the Nebraska Revenue Act of 1967, is actually a part of the sales tax rather than the income tax. Section 15 (3) provides that the food sales tax credit of $7 per qualified individual resident is not only allowed as a credit against the income tax payable, but is also allowed as a refund to the extent that the food sales tax credit exceeds the income tax payable by the resident individual for the taxable year. It also specifically provides that a resident individual, with excptions for individuals who are patients in or inmates of institutions exempt from the tax, shall be conclusively presumed to have paid "retail sales and use taxes imposed by this state equal to the maximum food sales tax credit allowable." It also provides for credits or refunds for "sales taxes" allowable by the subsection to be claimed on income tax returns, "or in the case of an individual not having tax liability in this state on such forms or claims for refunds as the Tax Commissioner shall prescribe."

The sales and use tax subdivision of L.B. 377, section 8 (2) (a), provides that if any sales or use tax amount has been paid more than once or been erroneously or illegally collected or computed, the excess amount collected or paid may be credited on any sales, use, or income tax amounts then due and payable from the person and any balance may be refunded.

The act itself establishes that the food sales tax credit is intended as a basic sales tax provision rather than an income tax provision.

While the legislative history of the amendment which added the food sales tax credit to L.B. 377 is not clear, a legislative policy is spelled out in the act to allow the credit or refund to be taken or claimed on the individual's state income tax return insofar as income tax returns may be required. For remaining cases, the refund is to be claimed on other forms. Sound administrative reasons would support this legislative policy decision. A

legislative determination to substitute the food sales tax credit in lieu of the exemption of certain foods from the provisions of the general state sales tax likewise seems evident. It is undisputed that the state could exempt or exclude foods or food products from the general sales tax if it so desired. The question remains whether the Legislature can constitutionally substitute a food sales tax credit and limit its application to residents.

It would seem reasonable for the Legislature to determine that generally a state sales tax on food for personal use will be paid almost universally by residents of the state, while purchases of such foods in the state by nonresidents are ordinarily minimal. It is also easy enough to see practical legislative and administrative reasons for the policy of a food sales tax credit in lieu of exempting certain foods from the operation of the general state sales tax. Under an ordinary or common exemption of specified or defined foods from a general sales tax, the Legislature and Tax Commissioner would have the problems of defining and describing the specific foods or food products which were to be exempted and which were not. Retailers charged with the collection of the tax would have the difficult task of separately computing and determining which food items were exempted and which were not. Merely the separate tabulation of taxable and nontaxable items would be a monumental task and additional expense for all concerned. The amount of tax involved would be minimal compared to the legislative, administrative, collection, and enforcement problems involved. For a discussion of such problems with sales and use taxes see, Pierce, Administration and Collection Problems, 9 Vanderbilt L. Rev. 281.

The power of a state to make reasonable and natural classifications for purposes of taxation is clear and unquestioned. "That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy. * * * Similarly, it has long

been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it." Allied Stores of Ohio, Inc. v. Bowers, 358 U. S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480.

"Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them." Toomer v. Witsell, 334 U. S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460.

Cases cited by the plaintiffs in support of their position here are either property tax cases or income tax cases involving personal exemptions, all involving no discernible reasonable basis for discrimination except residence. No sales tax cases are cited by any of the parties. Viewed as a form of state sales tax exemption, the classification between residents and nonresidents as to the credit or refund of sales taxes on food for personal use is supported by valid independent reasons other than mere residence.

Even if it be assumed that the food sales tax credit is a part of the income tax rather than the sales tax, the result should be no different. A credit or deduction on income tax for sales taxes paid on food for personal use should logically be treated as a personal expense deduction, as opposed to a business expense deduction. Obviously, all Nebraska sales taxes, including those on food, are deductible when they are properly a part of a business expense deduction, or part of a deduction for expenses incurred in connection with property held for the production of income. Such business expense deductions are available to both residents and nonresidents.

A credit or deduction for sales taxes on food for personal use should, therefore, be classified as incurred in personal or nonincome producing activities. The allowance of such credits or deductions constitute an exception to the general principle that personal living expenses are not allowed as deductions for income tax purposes. In the case of such personal credits or deductions, the state may appropriately allow them to residents but exclude them from deductions allowed to nonresidents. Goodwin v. State Tax Commission, 146 N. Y. S. 2d 172, 286 App. Div. 694 (1955). The holding in the Goodwin case stems from Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 40 S. Ct. 228, 64 L. Ed. 460, and Shaffer v. Carter, 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 445, both decided in 1920. The principle which supports such differentiation is the principle which limits both the taxable income and the deductible expenses of nonresidents to those connected with sources within the taxing state. The rule of the Goodwin case has also been adopted by other states since that time. See Berry v. State Tax Commission, 241 Or. 580, 397 P. 2d 780 (1964).

In our opinion, there are substantial reasons for the disparity of treatment between residents and nonresidents and the classification is not discriminatory nor arbitrary. Many facts support this classification, whether the credit, refund, or deduction be viewed from the aspect of a sales tax or an income tax. The Legislature may have been of the opinion that food purchases for personal use are so closely related to the state of residence, particularly with respect to the imposition of a state sales tax, that any exemption, credit, deduction, or refund should be allowed only by the state of residence and not by every other state in which some part of a taxpayer's income might be found and taxed. The wisdom of such a legislative policy is a matter for legislation rather than judicial decision. We hold that the allowance and limitation of the food sales tax credit only to residents does not constitute unjust or unreasonable discrimination under the privileges and immunities and equal protection clauses of the Fourteenth

Amendment.

Plaintiffs also contend that L.B. 377 provides for a sales tax, use tax, income tax, and a franchise tax, thereby violating Article III, section 14, of the Nebraska Constitution, which provides: "No bill shall contain more than one subject * * *." If an act has but one general object, no matter how broad that object may be, and contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate Article III, section 14, of the Constitution. Rein v. Johnson, 149 Neb. 67, 30 N. W. 2d 548.

The various taxes provided for in L.B. 377, designated as the Nebraska Revenue Act of 1967, are closely related and germane to each other and are all to be administered by the Tax Commissioner. The various taxes are clearly stated in both the title as well as the body of the act and together comprise and constitute components of the tax structure of this state. This court holds that the provisions of L.B. 377 contain but one general subject, taxation, and that it does not violate the Constitution of Nebraska.

There are other constitutional objections raised by the plaintiffs in their briefs. Essentially, these objections do not go to the validity of the income tax as a whole, or do not present justiciable issues as to these plaintiffs. This court has repeatedly held that it will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected. The courts will not set aside a law as violative of the Constitution for the reason that there is a possibility that one's interest may be injuriously affected in the future. Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N. W. 2d 626.

The finding and judgment of the lower court that section 115 was partially invalid to the extent it purported to make a violation of regulations of the Tax Commissioner a misdemeanor, but holding the particular invalidity severable, was correct.

The memoradum opinion of the district court evidences a thorough and comprehensive consideration of

the issues involved. The judgment of the lower court was correct in all respects and is affirmed.

AFFIRMED.